

STATE OF MICHIGAN
COURT OF APPEALS

LORI L. STONE, f/k/a LORI L. GILLER,

Plaintiff-Appellee,

v

TROOPER STEVEN TEMELKO,

Defendant,

and

TROOPER NICOLE HISEROTE,

Defendant-Appellant.

UNPUBLISHED

February 7, 2012

No. 301991

Washtenaw Circuit Court

LC No. 10-000501-NI

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

M. J. KELLY (*dissenting*).

Because I believe that a genuine issue of material fact exists as to whether Trooper Nicole Hiserote's actions amounted to gross negligence, I respectfully dissent.

Although not in the context of governmental immunity, Michigan courts have long recognized that in a close or doubtful case, proving gross negligence “‘calls for jury instruction and jury verdict rather than a verdict by order of the court.’” *Washington v Jones*, 386 Mich 466, 471; 192 NW2d 234 (1971), quoting *Tien v Barkel*, 351 Mich 276, 283; 88 NW2d 552 (1958); see also *Coon v Williams*, 4 Mich App 325, 333; 144 NW2d 821 (1966) (observing that in a close case, “[i]t was the jury’s prerogative to determine the question of gross negligence.”) And, while a violation of the speed limit, by itself, does not necessarily establish gross negligence, see *People v Lardie*, 452 Mich 231, 244; 551 NW2d 656 (1996), overruled not in relevant part *People v Schaefer*, 473 Mich 418, 433-434; 703 NW2d 774 (2005), under certain circumstances, a violation of the speed limit can be gross negligence. See *People v McCoy*, 223 Mich App 500, 504; 566 NW2d 667 (1997). As was noted in *McCoy*:

To state the obvious, a jury could properly determine that traveling at a speed of one hundred miles an hour through a residential neighborhood is gross negligence. Similarly, given the right conditions, it is possible to drive in a grossly negligent manner even in the absence of exceeding the speed limit (e.g., in heavy traffic, on slick roads, or in fog). Accordingly, the appropriate consideration is not whether the defendant was exceeding the speed limit, but rather, whether defendant acted with gross negligence under the totality of the circumstances, including defendant's actual speed and the posted speed limit. [Id.]

It is "the totality of the circumstances" that I believe we must focus on in determining whether a factual question exists here. The individual acts complained of (driving in tandem without first confirming the route they would take and knowing that the patrol vehicle's turn signals do not work when the emergency lights are on; driving at an unsafe speed; following too closely; failing to perceive that her colleague was braking hard to make the straight-line turn as she was trained to do; veering into the right lane; and driving outside of her 80 percent driving ability prior to the crash) on their own may only be evidence of mere negligence, but when layered on top of each other, these acts create a progressively more reckless and dangerous situation that could amount to "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a).

While this evidence may not be enough to determine it to be gross negligence as a matter of law, it is sufficient and proper for it to be submitted to the jury. Accordingly, I must dissent.

/s/ Michael J. Kelly